Supreme Court, U.S.
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No. 95-1360

In the Supreme Court of the United States

OCTOBER TERM, 1995

CLINTON WEBB, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the doctrine of equitable tolling may be applied to enlarge or suspend the statutory periods that limit (i) the time in which a claim for refund of income taxes may be filed (26 U.S.C. 6511(a)) and (ii) the amount of allowable recovery on a claim (26 U.S.C. 6511(b)).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Discussion	5
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Brockamp v. *United States*, 67 F.3d 260 (9th Cir. 1995)	5
Bull v. *United States*, 295 U.S. 247 (1935)	3
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)	3-4
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991)	4
Oropallo v. *United States*, 994 F.2d 25 (1st Cir. 1993), cert. denied, 114 S. Ct. 705 (1994)	4, 5
Vintilla v. *United States*, 931 F.2d 444 (11th Cir. 1991)	5

Statutes:

Internal Revenue Code (26 U.S.C.):	
§ 6511	2
§ 6511(a)	2, 3, 4
§ 6511(b)	2, 3, 4
§ 6511(b)(2)(B)	2
§ 7422	2

Miscellaneous:

BNA Daily Tax Report G-8 (March 21, 1996)	5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 66 F.3d 691. The opinion of the district court (Pet. App. 27a-38a) is reported at 850 F. Supp. 489.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1995. The petition for rehearing with suggestion for rehearing *en banc* was denied on November 28, 1995. The petition for a writ of certiorari was filed on February 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 6511 and 7422 of the Internal Revenue Code, 26 U.S.C. 6511, 7422, are set forth at Pet. 2-4.

STATEMENT

1. Petitioners are the executors of the estate of Mary Morton Parsons (Parsons), who died on August 26, 1990. Parsons was a wealthy widow who was victimized by her physician, Dr. Alvin Q. Jarrett, and her attorney, B. Roland Freasier. Under their influence, she made gifts of stock to trusts established for Jarrett and Freasier in 1980. She filed a gift tax return in 1980, paying a tax of $4,324,822 on these gifts. On audit by the Internal Revenue Service, Parsons made additional gift tax payments in 1986 and 1987 that exceeded $7,000,000 (Pet. App. 2a-3a).

Later in 1987, Parsons discovered that she had been defrauded by Jarrett and Freasier. She retained counsel to recover the assets that had been the subject of the gifts and also filed a refund claim to recover the gift taxes that had been paid (Pet. App. 3a). Acting pursuant to 26 U.S.C. 6511(b)(2)(B), the Internal Revenue Service refunded only the taxes paid within the two year period preceding the refund claim. The amount refunded, including interest, amounted to $9,844,541. The remainder of the refund claim—seeking recovery of the $4,324,822 payment made in 1980—was denied because the claim was filed more than three years after the gift tax return was filed and more than two years after the tax was paid, and was therefore untimely under 26 U.S.C. 6511(a) and barred by 26 U.S.C. 6511(b) (Pet. App. 2a-4a).

2. After Parsons's death, petitioners brought this refund suit in federal district court. The court agreed with the Commissioner that petitioners' re-

fund claim was untimely under 26 U.S.C. 6511(a) and was barred by 26 U.S.C. 6511(b) and therefore dismissed the case for lack of subject matter jurisdiction (Pet. App. 27a-38a).

The court noted that Parsons's refund claim was filed eight years after the tax was paid and the tax return was filed, and was therefore untimely under 26 U.S.C. 6511(a). The court further noted that, under 26 U.S.C. 6511(b), recovery on a refund claim is limited to the amount of tax paid (i) in the three years preceding the filing of the claim if the claim is filed within three years after the filing of the return, or (ii) within two years of the filing of the claim if the claim is not filed within three years after the filing of the return (or if no return was filed) . As the result, petitioners' recovery would be barred under 26 U.S.C. 6511(b) even if it were not untimely under 26 U.S.C. 6511(a).

3. The court of appeals affirmed (Pet. App. 1a-26a). The court rejected petitioners' contention that the doctrine of equitable tolling permits recovery of a tax refund claim that is untimely under 26 U.S.C. 6511(a) and barred under 26 U.S.C. 6511(b). The court stated that the decision of this Court in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), made a rebuttable presumption of equitable tolling applicable to suits against the government only when such tolling principles are applicable in similar suits involving private parties. The court noted that, in *Irwin*, this Court sought to achieve "[e]qual treatment of private and government defendants" by ensuring that equitable tolling applies to suits against the government "*in the same way that it is applicable to private suits*" (Pet. App. 10a-11a), quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. at 95

(emphasis added by court of appeals)). The court of appeals concluded that, when equitable tolling applies in a case brought against a private litigant, equitable tolling is also presumptively applicable in a comparable case against the United States. The court explained that, "[u]nlike tort actions or employment disputes, however, tax refund cases cannot be brought against private litigants, nor are they even comparable to suits that can be brought against private litigants" (Pet. App. 12a). Noting that taxes "are the life-blood of government" (*ibid.*, quoting *Bull* v. *United States*, 295 U.S. 247, 259 (1935)), the court concluded that an assumption that equitable tolling applies under Section 6511(a) and (b) would not be based on a realistic assessment of legislative intent. The court therefore held that "*Irwin*'s rebuttable presumption of equitable tolling is not applicable in tax refund suits" (Pet. App. 14a).

The court further held that, "[e]ven if *Irwin*'s presumption of equitable tolling were applicable in tax refund suits, the taxpayers would still not prevail here" (Pet. App. 14a). The court agreed with the analysis of the First Circuit in *Oropallo* v. *United States*, 994 F.2d 25 (1993), cert. denied, 114 S.Ct. 705 (1994), that the combined limitations of Section 6511(a) and (b) are "inconsistent with equitable tolling" (Pet. App. 16a). The court noted that the substantive limitations on recovery contained in Section 6511(b) serve as a "separate and independent 'time barrier[]' to recovery, * * * a period of repose which itself, standing alone, is 'inconsistent with tolling'" (Pet. App. 17a, quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991), and *Oropallo* v. *United States*, 994 F.2d at 30).

DISCUSSION

Petitioners correctly note (Pet. 13-26) that the decision of the Ninth Circuit in *Brockamp* v. *United States*, 67 F.3d 260 (1995), petition for cert. pending, No. 95-1225, conflicts with the decision of the Fourth Circuit in this case and also conflicts with the decision of the First Circuit in *Oropallo* v. *United States*, 994 F.2d 25 (1993), cert. denied, 114 S. Ct. 705 (1994), and of the Eleventh Circuit in *Vintilla* v. *United States*, 931 F.2d 1444 (1991). Petitioner is also correct that the question presented in the petition for a writ of certiorari in *Brockamp* is a recurring question of substantial administrative importance. See 95-1225 Pet. 20. The question is presented in *Brockamp* in factual settings that are more typical than the unusual circumstances of this case.

Because disposition of the question presented in *Brockamp* will also dispose of the question presented in this case, the petition for a writ of certiorari in this case should be held pending the disposition of *United States* v. *Brockamp*, No. 95-1225.[1]

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[1] Legislative proposals currently under consideration may prospectively resolve the question presented in this case. See BNA Daily Tax Report G-8 (March 21, 1996).

CONCLUSION

The petition for a writ of certiorari should be held pending the final disposition of *United States* v. *Brockamp*, No. 95-1225, and then disposed of as appropriate in light of the disposition of that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1996